SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

CLARENCE CROMER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinion of the Court Below.

The opinion of the United States Court of Appeals for the District of Columbia, announced March 20, 1944, not yet in official volume, is contained on pages 104 et seq. of the Record.

Petitioner filed his petition for rehearing within time, and the same was denied on April 7, 1944. Said petition is contained on pages 108-113 of the Record herein. The judgment of said Court of Appeals affirmed the judgment and sentence of the trial Court, the District Court of the United States for the District of Columbia (Rec. 106).

I.

Jurisdiction.

The jurisdiction of this Court in this case is invoked under sec. 240 (a) of the Judicial Code, as amended by the

Act of February 13, 1925, chap. 229, sec. 1, 43 Stat. 938, Title 28, U. S. C. A. sec. 347 (a).

II.

Statement of the Case.

A statement of the case is set forth in the accompanying petition at pages 8-14. Repetition is not made here, but reference thereto is respectfully asked.

III.

Specification of Errors.

The United States Court of Appeals for the District of Columbia erred in the following particulars:

1. In holding that the variance between the allegation in each count of the indictment and the proof of the prosecution as to the quantity or number of grains of heroin hydrochloride was not a material or fatal variance.

2. In holding that the variance between the allegation in each count of the indictment and the proof of the prosecution as to the misdescription of the substance was not a material or fatal variance.

3. In holding that the allegation in counts 1, 3, 5, 7, and 9 of the indictment that the sale of the drug was made "not in pursuance of a written order from the said Rufus Ford, on a form issued for that purpose by the Commissioner of Revenue" stated a crime under sec. 2554 (a) and (f), Title 26, U. S. C., and in not holding that such allegation, under said statute, should have been in substance, "not in pursuance of a written order from the said Rufus Ford, on a form prescribed by the Commissioner of Narcotics and issued for that purpose to a Collector of Internal Revenue."

4. In sustaining the ruling of the trial court in overruling petitioner's motion for a mistrial, over objection and exception of petitioner.

5. In sustaining the ruling of the trial court permitting the use by the prosecution, over objection and exception of petitioner, of certain evidence, seized by the narcotic agents and police acting in concert with said agents, from the roof of a shed located on property adjacent to petitioner's home and premises, without a warrant of arrest and without a search warrant.

6. In affirming the uncertain, ambiguous and illegal, accumulated, harsh sentences imposed upon the petitioner by the trial court.

Argument.

1. As to the material and fatal variance between allegation in each count of the indictment and the proof as to the quantity or number of grains of heroin hydrochloride, the Court of Appeals held that the variance was not fatal, and, among other things, said that "It appeared that appellant [petitioner] was defrauding his illicit customers." The Court also held, erroneously, we submit, that the cases relied upon by petitioner had been overruled by *Berger* v. *U. S.* 295 U. S. 78, 82 (1935). We submit that the *Berger* case announces the general rule that allegation and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him so that he may be enabled to present his defense and not to be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. We submit that the cases of *Guilbeau* v. *U. S.*, 288 F. 731 (CCA, 5, 1923) and *Coleman* v. *U. S.*, 26 F. (2) 870 (CCA, 8, 1928) apply the principles of law decided by this Court in the *Berger* case, *supra,* and

that the Court of Appeals erred in holding that those cases were overruled by the *Berger* case. In the *Guilbeau* case (288 F. 731), *supra,* the Circuit Court of Appeals for the 5th circuit held that in a prosecution under the Harrison Anti-Narcotic law in which the indictment alleged a sale of morphine sulphate, evidence of the sale of morphine hydrochloride was a substantial variance and was not sufficient to sustain a conviction, and the variance was not cured by the act of February 26, 1919 (Comp. St. Ann. Supp. 1919, sec. 1246). And in *Coleman* v. *U. S.*, 26 F. (2) 870 (CCA 8, 1928) the court held that in a prosecution alleging an unlawful sale of morphine, proof establishing sale of sulphate hydrochloride, a derivative of morphine, was insufficient to sustain a conviction, since sulphate hydrochloride is not morphine. As hereinbefore pointed out, while *the Guilbeau and the Coleman cases* are in conflict with the decision of the United States Court of Appeals for this District, in the instant case, as well as the case of *MacIntosh* v. *U. S.* 1 F. (2) 427 (CCA 7, 1923), we contend that the ruling in *the Guilbeau and the Coleman cases* is bottomed upon the principle announced in the *Berger* case (295 U. S. 78, 82).

In the *Berger* case while this Court held that where the proof showed two conspiracies, each fitting the single charge in the indictment, and each participated in by some but not all of the convicted defendants, one of them who was connected by the evidence with one only of the conspiracies revealed by it has no ground to complain of the variance if it did not affect his substantial rights, but this Court said on page 83 (bottom) "We do not mean to say that a variance such as that here dealt with might not be material in a different case."

2. As to the variance between the allegation in each count of the indictment and the proof of the prosecution as to the misdescription of the substance alleged to have been sold

by petitioner to the witness Rufus Ford: In each of the twelve counts the allegation described the substance as heroin hydrochloride (Rec. 1-5) and the evidence produced by the prosecution disclosed that the substance was a mechanical mixture composed chiefly of milk sugar or cane sugar with a relatively small quantity of heroin hydrochloride (Rec. 39, 48, 55, 64, 78). Petitioner objected to the introduction in evidence of the samples (Rec. 79, 80, 81) on the ground of a material, fatal variance between allegation and proof, which was overruled and exception noted (Rec. 81). The point of fatal variance between allegation and proof was also raised by petitioner, at the conclusion of all of the evidence by motion to direct a verdict of not guilty, which was overruled, to which exception was noted (Rec. 82). The same point was also raised by petitioner's proffered prayers from Nos. 1 to 8, inclusive (Rec. 82-85), each of which was denied, and exception taken (Rec. 83-4-5).

In *St. Louis, San Francisco & Texas Ry.* v. *Seale*, 229 U. S. 156, at bottom of page 161, this Court said that "In short, the case pleaded was not proved and the case proved was not pleaded." The holding in that case seems to be peculiarly applicable to the instant case.

In *De Jonge* v. *Oregon*, 299 U. S. 353, at top page 362, this Court held that a "Conviction upon a charge not made would be sheer denial of due process."

3. Counts 1, 3, 5, 7 and 9 fail, and each fails, to allege a crime under the Harrison Anti-Narcotic Act in that it is alleged in each of the counts that the sale of the substance was made "not in pursuance of a written order from the said Rufus Ford on a form issued for that purpose by the Commissioner of Internal Revenue" whereas the authority to prescribe the written order was vested in the Commissioner of Narcotics and to distribtue the same to the Collectors of Internal Revenue, who, in turn, are authorized to

issue the same upon payment of the tax therefor. In this connection, reference is hereby made to the statutes and treasury decisions heretofore set forth in the annexed petition (pages 1-20). Therefore, each of the odd numbered counts fails to state an offense by reason of the misdescription aforesaid, and each of them is bad, in accordance with the principle of law announced by this Court in *Fleisher et al.* v. *U. S.*, 302 U. S. 218 (1937, (reversing s. c. in 91 F. (2) 404) in which it is held that:

> "Registration of stills for the production of distilled spirits should be with the District Supervisor of the Alcohol Tax Unit in the Bureau of Internal Revenue.
>
> "A count charging conspiracy to commit the offense of possessing such stills 'without having the same registered with the Collector of Internal Revenue, as required by law,' is therefore bad."

In each of the odd numbered counts (except 11) of the indictment, in the instant case, alleged, in describing the offense, that a sale was made not in pursuance of a written order from the said Rufus Ford, on a form issued in blank for that purpose by the Commissioner of Internal Revenue, whereas the allegation should have been, in substance, on a form prescribed by the Commissioner of Narcotics and issued by the Collector of Internal Revenue (and not by the Commissioner of Internal Revenue).

The opinion of the appellate court in the instant case questions "whether the per curiam decision in *Fleisher* v. *United States*, 302 U. S. 218 (1937), limits the above well-settled rule [referring to the Berger case]. Despite the apparent applicability of the *Berger* case to the facts of the *Fleisher* case, the government confessed error in the latter case, and no reasons given in that case indicate a narrowing of the general principle. We can discover no cases attempting to reconcile the apparent conflict" (Rec. 106, footnote).

May we suggest that the Berger case announced the general rule applicable when the question of a fatal variance is presented in a criminal case, whereas the Fleisher case applied the rule to specific facts presented. We submit that there is no conflict between the two cases, and the Court of Appeals, in the instant case, misconceived the said decisions of this Court, and failed to follow them.

If, as the said Court of Appeals held, there is a conflict (which we submit there is not) between the Berger case and the Fleisher case, then the Fleisher case, decided in 1937, is later and controls over the Berger case, decided in 1935. It is to be noted that the writ of certiorari was limited in the Fleisher case to the single point (302 U. S. 673, entitled *Harry Fleisher* v. *U. S.; Sam Fleisher* v. *U. S.* and *Stein* v. *U. S.*) whether the first count of the indictment stated an offense under federal law, which involved the point of fatal variance. This Court reversed 91 F. (2) 404, and the point upon which the case was reversed was not discussed or decided by the Circuit Court of Appeals. As we read the decision in the Fleisher case, the pivotal question was whether the first count stated an offense by reason of the fatal variance between the statute and the allegation in the indictment. It is our contention that this is not a mere technical objection but it is a fundamental question in view of the Fifth and Sixth Amendments to the Federal Constitution.

The Court of Appeals in the instant case seemed to stress that the decision in the Fleisher case was a per curiam one, but it would appear that that Court failed to appreciate that the decision was necessarily unanimous. That Court also held that "We can discover no cases attempting to reconcile the apparent conflict." The undersigned counsel confess that they do not understand this holding.

4. The Court of Appeals, in the instant case, sustained the ruling of the trial court in denying petitioner's motion to withdraw a juror and declare a mistrial on the ground of the misbehavior of two government witnesses. As set forth in the Statement of the Case all witnesses were put under the usual rule of separation.

The unusual method pursued by counsel for the prosecution in examining government witnesses partially, thereby limiting cross-examination, and thereafter constantly calling them for re-examination in chief, during the trial, which consumed from April 12, 1943 to April 19, 1943 (Rec. 28 and 7), was not only in effect, an invasion of the court's order made at the beginning of the trial, such procedure afforded witnesses opportunity to discuss the case, and resulted in the denial of a fair and impartial trial and of due process of law within the meaning of the Fifth Amendment to the Federal Constitution. The Record shows the above method of procedure. (Rec. 30-35; 45-47; 54-55; 61-63; 71-76; 35-38; 43-45; 52-54; 63-4; 67-70; 38-41; 47-50; 55-8; 64-66; 77-80).

Petitioner's motion to withdraw a juror and declare a mistrial on the ground of the misbehavior of two government witnesses, narcotic agents Trigstead and Fields, when said Trigstead admitted on the witness stand (Rec. 46-7) that during the noon recess of the court he and the witness Fields had discussed the testimony previously testified to by said Fields as to who in the office of the narcotic division (wherein the government exhibits or samples were kept) had access to the safe in said office, which resulted in a change in the testimony on the part (Rec. 47) of the witness Trigstead (who testified after said discussion between him and said Fields), despite the fact that the court had ordered all witnesses not to discuss the facts of this case with any one or among themselves, during the recess of court, during the pendency of this trial.

The Court of Appeals, in its opinion in the instant case, omitted to discuss or rule specifically as to the misbehavior of the government's witnesses, as above outlined, which formed the basis of petitioner's motion for a mistrial, although the point was stressed in the brief of petitioner filed in that Court. Therefore, petitioner renewed the question in his petition for rehearing (Rec. 113) and especially asked the Court to make a definite ruling in regard thereto to guide the trial courts of this jurisdiction, but the Court of Appeals denied the petition for rehearing, generally, without opinion.

We respectfully submit that it is imperative that a uniform rule of practice and procedure for all federal district courts be laid down by this Court as a guide, especially when the same witnesses are constantly called and re-called, for examination, in chief, to testify as to many counts of an indictment. The order of proof, being within the discretion of the trial court, we submit that when the witnesses are put under the usual rule, and thereafter purposely disobey the order of the court, and discuss the case with fellow-witnesses, a defendant is put at a great disadvantage, the result of which is he cannot obtain due process of law, or a fair trial. After such happening, which occurred in the instant case, it was the duty of the trial court, we submit, to grant defendant's motion for a mistrial.

5. The Court of Appeals in the instant case committed grave error, in violation of the Fourth and Fifth Amendments to the Federal Constitution (especially called to the attention of that Court) in sustaining the ruling of the trial court, over objection and exception of petitioner, in admitting in evidence a certain card-board box, which, according to the government chemist, a witness in behalf of the prosecution, contained 2,705 grains of a mechanical

mixture, consisting of 40.03 grains of heroin hydrochloride and the remaining 2,654.97 grains were milk sugar (Rec. 78). Said cardboard box was found by the narcotic agents, accompanied by local police acting in concert with said agents, on the roof of a shed located on property adjacent to petitioner's home and premises, after said agents and police had entered petitioner's home and back-yard, *without a warrant of arrest for petitioner and without a search warrant* (Rec. 69, 76). The said evidence, so illegally obtained, was used at the trial to convict the petitioner on the 11th and 12th counts of the indictment. The government offered no proof showing that said box and its contents belonged to the petitioner, nor was the same ever claimed by him, or that he ever had possession thereof. The said evidence was obtained by a general exploratory search, without any warrant of arrest or search warrant, of petitioner's home and premises by the narcotic agents and police officers accompanying them. The Court of Appeals in the instant case says "The government contends that since they were found on other property appellant has no standing to object to their seizure." And further:

"We need not decide this question because the appellant did not move before the trial for the suppression of this evidence or explain his failure to do so."

The opinion of the said Court of Appeals apparently adopts the contention of the prosecution, namely, that petitioner could not have objected to the use in evidence of things (contained in the box) because they were seized on property other than that of petitioner, regardless of the fact that petitioner never claimed to own the box and/or its contents, and no proof was offered at the trial that he was owner or custodian thereof. In thus ruling, the Court of Appeals overlooked the rule of law that defendant is required to allege ownership in personal property seized in violation of the Fourth Amendment to the Federal Con-

stitution in a motion to suppress evidence which he believes the prosecution intends to use against him. Since the petitioner never claimed ownership of the card-board box and/or contents, and having no notice from the prosecution, after his illegal arrest, or before trial, that the prosecution would offer in evidence the box and/or its contents, he was not required to file a motion prior to trial to suppress the evidence, and he was entitled to object to such evidence *at the trial*, which he did, but such objection was overruled, to which exception was taken, and the government succeeded in convicting petitioner, by the use of such evidence, on the 11th and 12th counts, and the court sentenced petitioner to imprisonment for 20 months to 5 years on count 11, and for a term of 40 months to 10 years on count 12.

The foregoing situation presents an exception to the ordinary rule requiring a motion before trial to suppress things unconstitutionally seized. *Agnello v. U. S.* 269 U. S. 20, 30, 31, 32, in which it is held at page 32: "While the question has never been directly decided by this Court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. *Boyd* v. *U. S.* 116 U. S. 616, 624-630; *Weeks* v. *U. S. supra*, 393; *Silverthorne Lumber Co.* v. *U. S.*, supra 391; *Gouled* v. *U. S.* 255 U. S. 298, 308. *The protection of the Fourth Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant.*" (Italics supplied)

In *U. S.* v. *Tom Yu*, 1 Fed. Supp. 357 (D. C. Ariz.) a narcotic case, the court held that belief that the article sought is concealed in a dwelling does not justify a search without

warrant, notwithstanding the facts unquestionably show probable cause.

In *Taylor* v. *U. S.* 286 U. S. 1-6, the Court held that "suspicion that a person is engaged in violations of the prohibition law, confirmed by the odor of whisky and by peeping through a chink in a garage standing adjacent to his dwelling and part of the same premises, will not justify prohibition officers in breaking into the garage and seizing the whisky for the purpose of obtaining evidence of guilt. P. 5" (reversing 55 F. (2) 58). In that case, the Court says (bottom p. 5) the search and seizure were undertaken with the hope of securing evidence upon which to indict and convict the defendant. * * * "We think, in any view," said this Court "the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed."

6. The judgment imposing sentence upon petitioner is void for uncertainty and ambiguity, and the same is illegal, because said sentence deprives petitioner of due process of law under the Fifth Amendment to the Federal Constitution, and is violative of the Eighth Amendment to said Constitution in that it inflicts upon petitioner cruel and unusual punishment.

The language of the judgment (Rec. 11-12) imposing sentence upon petitioner is contained on page 9 of the Statement of the Case in attached petition praying for Certiorari, and reference thereto is respectfully asked.

The twelve sentences imposed on petitioner by the trial court are *in solido,* and petitioner was tried on all of the twelve counts of the indictment in one trial, and a general verdict of guilty was rendered (Rec. 7).

The sentences (Rec. 11-12) imposed upon petitioner are: 40 months to 10 years and pay a fine of five thousand dollars on count 2; and 40 months to 10 years on each of counts

4, 6, 8, 10 and 12, "*each count to run concurrently and concurrently with count two.*" (We presume that the trial court meant that *the sentence* on each of the counts 4, 6, 8, 10 and 12 is to run concurrently and concurrently with count two, but the judgment of the court fails to set that forth.)

The judgment continues (Rec. 11-12): "and Twenty (20) months to Five (5) years on count one, to take effect at expiration of sentence imposed on count two; and Twenty (20) months to Five (5) years on each of counts three, five, seven, nine, and eleven, *each count* to run concurrently and concurrently with sentence imposed on count one." (Here again "each count" are the words used, instead of "sentence" on each count, and the judgment fails to definitely set forth a legal sentence.) It is our contention that the result is that the combined accumulated sentences are indefinite, ambiguous, and uncertain. Compare *Fleisher et al.* v. *U. S.* 302 U. S. 218, in which this Court held "when the first of several counts upon which consecutive sentences are based is defective the sentences should be corrected so as to fix a definite date for their commencement."

"Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." *U. S.* v. *Daugherty,* 269 U. S. 360.

In imposing the sentences, the trial court failed to observe Rule 1 of Rules of Practice and Procedure in criminal cases, promulgated by this Court, in that the court should have imposed sentence *first on count one* upon which petitioner *was first convicted.*

The irregularity of first imposing sentence of 40 months to 10 years on count 2, with concurrent sentences of similar duration on the remaining five even numbered counts, and then imposing concurrent sentences of 20 months to 5 years on the odd numbered counts prevents petitioner's eligibility

for parole until petitioner shall first serve the maximum sentence of 10 years on count 2.

The combined concurrent and consecutive sentences, under the circumstances, result in the deprivation of due process of law in violation of the Fifth Amendment to the Federal Constitution, and further, said sentences constitute cruel and unusual punishment within the meaning of the Eighth Amendment to the Federal Constitution. *Weems* v. *U. S.*, 217 U. S. 349, 375, 378. On page 378, in the *Weems* case, the Court says that "the clause in the Constitution in the opinion of the learned commentators may be therefore progressive, and not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." (Cases.) On page 375, the Court cites approvingly the case of *State* v. *Driver*, 78 North Carolina, 423, 427, holding that a sentence of defendant for assault and battery upon his wife of imprisonment in the county jail for five years, and at the expiration thereof to give security to keep the peace for five years, in the sum of five hundred dollars with sureties, was held to be cruel and unusual punishment.

The history of the adoption of the Eighth Amendment to the Federal Constitution is reviewed and discussed in *Weems* v. *U. S. supra.*

WHEREFORE, it is respectfully submitted that the writ of certiorari should be granted.

LEVI H. DAVID,
Bond Building,
Washington, D. C.,
M. EDWARD BUCKLEY, JR.,
406 5th Street, N. W.,
Washington, D. C.,
Attorneys for Petitioner.

May 10, 1944.